No. 590.

FILED
MAR 10 1902
JAMES H. McKENNEY,
Clerk.

Mo. to dismiss or affirm.

590.

SUPREME COURT OF THE UNITED STATES.

Filed Mar. 10, 1902.

OCTOBER TERM, 1901.

No. ——

NEW ORLEANS WATER WORKS, COMPANY, PLAINTIFF IN ERROR.

Versus

STATE OF LOUISIANA, ORIGINAL PLAINTIFF

AND

CITY OF NEW ORLEANS, INTERVENOR, DEFENDANT IN ERROR.

Error to Supreme Court of Louisiana.

MOTION TO DISMISS OR AFFIRM.

And now this February, 1902, Walter Guion, Attorney General of the State of Louisiana, herein appearing and moving in behalf of the State of Louisiana, defendant in error, and Benjamin Rice Forman, Attorney and of Counsel for the State of Louisiana, thereto especially authorized by Walter Guion, Attorney General, and also Samuel L. Gilmore, City Attorney of the City of New Orleans, Louisiana, move the Court to dismiss the writ of

error herein, on the ground that no question under Revised Statutes §709 was properly raised in or was decided by the Supreme Court of Louisiana; or in the alternative, said Defendants in Error through their said attorneys, further move the court to affirm the judgment on the ground that if the record show thot this Court has jurisdiction it is manifest that the questions on which jurisdiction depends is so frivolous as not to need further argument.

And that this motion be made returnable on Monday, 10th March 1902.

WALTER GUION,
Attorney General of the State of Louisiana.
BENJAMIN RICE FORMAN,
Attorney and Counsel for the State of Louisiana.
SAMUEL L. GILMORE,
City Attorney for the City of New Orleans.

No. 590.
Brf. of Guion, Forman
for D. C. Connor

FILED
MAR 10 1902
JAMES H. McKEN

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

Filed Mar. 10, 1902.

NO. 590

NEW ORLEANS WATERWORKS COMPANY, PLAINTIFF IN ERROR,

Versus

STATE OF LOUISIANA AND CITY OF NEW ORLEANS, DEFENDANTS IN ERROR.

Brief of Argument of Defendants in Error on Motion to Dismiss or Affirm.

WALTER GUION,
Attorney General.
BENJAMIN RICE FORMAN,
Of Counsel for the State of Louisiana.
SAMUEL L. GILMORE,
City Attorney
for the City of New Orleans, intervenor,

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

NO.

NEW ORLEANS WATERWORKS COMPANY, PLAINTIFF IN ERROR,

Versus

STATE OF LOUISIANA AND CITY OF NEW ORLEANS, DEFENDANTS IN ERROR.

Brief of Argument of Defendants in Error on Motion to Dismiss or Affirm.

The great public interests involved and the fact that the City of New Orleans, a city in a semi-tropical climate, with nearly three hundred thousand inhabitants, is without an adequate supply of pure and wholesome water, about four hundred miles of its inhabited streets being without any public water

supply at all, and the dwellers thereon rely solely on private tanks or cisterns catching rain water, and which go dry in a drought, and the great public harm that would result from any further delay, causes your movers to ask an early consideration and decision of this motion to dismiss or affirm.

It is manifest from an inspection of the record and printed copy of the pleadings and judgment hereto annexed, that this Court is without jurisdiction to review the judgment of the Supreme Court of Louisiana, and that the Writ of Error sued out is but for delay, and can only result in delay when an inspection of the record will show the Court that it has no jurisdiction.

The charter of the New Orleans Water Works Company having been before this Court on several occasions, is not necessary to be here repeated and printed. It was created by Act No. 33, of 1877, of the State Legislature. On the 9th of June, 1898, the Legislature passed a concurrent resolution, found at page 6 of the Session's Acts of that year, as follows:

"Whereas the Supreme Court of Louisiana has decided that the New Orleans Water Works Company has violated the terms of its franchises by charging consumers a higher rate than the franchise granted by the State allowed them to do; and

"Whereas there exists a general complaint of the

quality and quantity of the water supplied by the said Company:

"*Be it Resolved*, by the Senate and House of Representatives concurring therein, that a committee, composed of five members, be constituted, two of said members to be appointed by the President of the Senate and three to be appointed by the Speaker of the House of Representatives, with instructions to investigate the above-mentioned complaints and methods of operation of the said New Orleans Water Works Company; and

"*Be it further Resolved*, That the committee report back to the General Assembly such action as they may deem necessary for the public interest in the premises.

S. P. HENRY,

Speaker of the House of Representatives.

R. H. SNYDER,

Lieutenent-Governor, President of the Senate.

Approved June 7th, 1898.

MURPHY J. FOSTER,

Governor of the State of Louisiana.

A true copy:

JOHN T. MICHEL,

Secretary of State."

Thereupon, the said committee had a prolonged investigation, examined numerous witnesses, at

which the New Orleans Water Works Company was represented by Counsel learned in the law, and by R. E. Craig, its President, and on the report of the said committee the Legislature passed the following resolution, found at page 264, Act No. 150, of the Sessions of 1898:

"Whereas the majority and minority report of the joint committee of the House and Senate appointed to investigate the affairs, administration and condition of the New Orleans Water Works Company, have been submitted to the General Assembly, together with the testimony and evidence adduced at the various sessions of the said committee; and

"Whereas the subject matter of the said reports involves consideration and determination of intricate questions of law and fact; and

"Whereas it is impossible, in view of the limited time at its discretion, for the General Assembly to give the matter the examination and consideration necessary for a proper determination thereof:

"*Be it, therefore, Resolved*, by the Senate and House of Representatives concurring, that the subject matter of the said report, together with the testimony and evidence upon which they are based, be respectfully referred to the Attorney General of the State for such action in the premises as he may deem proper.

S. P. HENRY,
Speaker of the House of Representatives.

R. H. SNYDER,

Lieutenant-Governor, President of the Senate.

Approved July 14th, 1898.

MURPHY J. FOSTER,

Governor of the State of Louisiana.

A true copy;

EUGENE J. McGIVNEY,

Assistant Secretary of State.

And thereupon, all of the testimony taken by the said committee was put into the hands of Milton J. Cunningham, then Attorney General, and under the authority vested in him by law, he filed a suit in the name and behalf of the State of Louisiana, in the Civil District Court for the Parish of Orleans, which had jurisdiction thereof, to forfeit the charter and franchises of the New Orleans Water Works Company, on the various grounds which appear in a copy of the petition hereto annexed, pages 1 to 8, alleging that it was guilty of abuses of its privileges and franchises, and had refused and neglected to accomplish the conditions on which the said privileges were granted:

It has been settled law in Louisiana, certainly since the year 1825, that "A corporation legally es- "tablished may be dissolved by forfeiture of the "charter when the corporation abuses its franchises "or refuses to accomplish the conditions under which

" said privileges were granted, in which case the " corporation becomes extinct by effect of the vio- " lation of the conditions of the Act of Incorpora- " tion." Civil Code of Louisiana, Art. 447; Atchafalaya Bank vs. Dawson, 13 La. Reports, p. 500, and in the case of the State of Louisiana vs. The New Orleans Gas Light and Banking Company, 2d Robinson (La.) Reports, 529. It was held that this Article of the Code applies to every charter granted since its adoption, and is to be considered as having been written in the charter of every corporation, quoting Angell and Ames on Corporations, 510, and Kent's Commentaries, Vol. II, p. 251, the Court saying: " It is now well settled that an " act of incorporation may be forfeited for a misuse " or abuse of the power entrusted to it. It is a tacit " condition of a grant of incorporation that the " grantees shall act up to the end or design for which " they were incorporated. It they do not, their " rights and franchises may be withdrawn, but those " misuses or non-uses of its franchises must be ju- " dicially ascertained."

The New Orleans Water Works Company, through its proper officer, was duly served with process in the said suit to forfeit its charter, p. 9, and thereupon it appeared in the Civil District Court by Counsel and filed what in Louisiana practice is called *exception to the petition*, which being overruled

by the Civil District Court, it filed an answer, a copy of which is found in the printed copy of the record, hereto annexed, p. 10.

That thereupon the case coming on for trial, on or about the 9th of November, 1899, the trial was continued from day to day. A vast amount of documentary evidence, and about two hundred and forty-eight (248) witnesses being examined and cross-examined by Counsel for New Orleans Water Works Company, elaborate arguments heard and printed briefs offered on the part of the defendant, and when the Civil District Court Judge rejected the demand of the State of Louisiana, thereupon the State of Louisiana, through its Attorney-General, appealed to the Supreme Court of the State of Louisiana, which had jurisdiction of the cause, and the City of New Orleans, through its attorney, likewise took an appeal, and the case came on to be heard in the Supreme Court of Louisiana, which had jurisdiction both of the law and the facts under the Constitution of Louisiana.

On the 22d of January, 1901, an elaborate argument was heard and briefs filed on the part of defendant, and thereupon the Supreme Court of Louisiana, on the 6th of November, 1901, rendered its decree, forfeiting the charter and franchises of the New Orleans Water Works Company, a copy of which is hereto annexed (pages 81 to 122), and on 3d Feb-

ruary, 1902, refused a rehearing in an elaborate opinion (pages 123 to 145).

At this writing, we have seen no assignment of error, but, judging from the answer, there are but two grounds on which the New Orleans Water Works Company claims the right to bring the case here by Writ of Error. The first is, that this suit is not due process of law. This is simply an abuse of the English language, absurd on its face, after the elaborate trial that took place on issue joined in a court of competent jurisdiction, and requires no argument or authority to refute. Simon vs. Craft, 182 U. S., 427.

It is equally absurd to say that because the New Orleans Water Works Company had issued its mortgage bonds and secured the said bonds by mortgaging its property and franchises, that, therefore, its franchises and charter could not be forfeited for a non-compliance with the conditions upon which it was granted, in a proper suit, and after hearing of evidence, because the holders of those mortgage bonds were not made parties to the suit.

In the first place they were not necessary parties.

In the next place, since the bonds passed from hand to hand, it would be impossible to make them parties or to know who they were; and

In the third place, they took the bonds knowing the laws of Louisiana, and that the charter and fran-

chises of the corporation were subject to forfeiture for non-compliance with the condition on which they were granted. It would be as correct to say that a convict could not be hung for murder because he owed debts; and

In the fourth place, the suit was of a notorious and public character, and under the Article of the Code of Practice of Louisiana, No. 389, any bondholder of the Water Works Company could have intervened in the suit and joined the defendant between the filing of the suit, in January, 1899, and the commencement of the trial, on the 9th of November, 1899, or, in fact, at any time before final submission, in April, 1900, as long as such intervention would not delay the decision of the cause.

Therefore, the claim that such a suit was not due process of law scarcely deserves the respect of criticism.

II.

The other ground for claiming Federal jurisdiction is, that this suit is repugnant to the provision in Article I, Section 10 of the Constitution, prohibiting the State from impairing the obligation of contracts.

The case was decided on the facts found proven by the State Court, and the general principles of law, and no Federal question was decided nor necessarily involved.

In Cornell vs. Rambese, 10 Peters, 391, Mr. Justice Story, elaborately reviews previous decisions and settles the question of jurisdiction of the Court to review decisions of the State Courts.

In Armstrong vs. Treasurer of Athens, 16 Peters, 285, this Court said: "It must appear from the record that the (Federal) question was necessarily involved in the decision, and that the State Court could not have given the judgment or decree which they passed, without deciding it. To same effect is Hoyt vs. Sheldon, 1 Black, 518.

In Knox vs. Exchange Bank, 12 Wallace, 379, this Court said: "This Court cannot entertain jurisdiction of a case from a State Court, because the judgment of that Court impairs or fails to give effect to a contract. The judgment must give effect to some State statute or State Constitution which impairs the obligation of a contract."

See also Murdock vs. Memphis, 20 Wallace, 590;

McMains vs. O'Sullivan, 90 U. S., 578;

Bolling vs. Lessuer, 91 U. S., 575;

Brown vs. Atwell, 92 U. S., 329;

N. Y. Life Ins. Co. vs. Hendren, 92 U. S., 286;

Crossley vs. City of Orleans, 108 U. S., 105.

But while it is settled that the charter of the New Orleans Water Works Company is a contract, it is equally well settled that this prohibition

of the Federal Constitution is levelled against the exercise of legislative power in arbitrarily repealing a charter, and not against a formal suit in Court to annul the contract contained in the charter for a violation of its provisions. See Chicago Insurance Company vs. Needles, 113 U. S., 574; and Commonwealth of Kentucky vs The Louisville Bridge Company, 42 Federal Reporter, 241; New Orleans Water Works Company vs. The Louisiana Sugar Refining Company, 125 United States Reports, p. 30; Farmers' Loan and Trust Company vs. Galesburg, 133 United States Reports, 156, affirming the 34 Federal Reporter, 675; St. Paul, Minneapolis and Manitoba Railway Co. vs. Todd County, 142 U. S., p. 282; Blount vs. Walker, 134 U. S., p. 614; De Saussere and Gaillaird, 127 U. S., p. 216-232.

The Legislature of Louisiana, realizing that the old water supply was inadequate, in an extra session, called for the purpose, passed Act No. 6 of the extra session of 1899, creating a Sewerage and Water Board, which was approved August 18th, 1899, and charged the Sewerage and Water Board of the City of New Orleans with the duty of establishing a system of Sewerage, and of providing the inhabitants of the City of New Orleans with an adequate supply of pure and wholesome water, and on the vote of the people, voting a special tax to carry

out the object of the said Water Board, and to pay the interest on the bonds authorized an issue of some sixteen millions of dollars, for the purpose of giving the City of New Orleans an adequate supply of pure and wholesome water, as well as sewerage.

This Sewerage and Water Board has waited until the present time before actually commencing work, awaiting the final decision of the Supreme Court of Louisiana forfeiting the charter and monopoly franchises of the New Orleans Water Works Company, in order that it might not be enjoined from prosecuting this most important public work—so important to the health of the inhabitants of the City of New Orleans. It has already awaited the result of the decision in this case since the Board was created, in August, 1899, occupying the time with preliminary surveys, calculations and estimates, and perfecting its plans, and now the time has arrived when it should actually commence work, and it should not be further retarded by delay in this Court on a Writ of Error in a case in which this Court has no jurisdiction, and in order to prevent injury to the public health and welfare, which would result from any further delay, we are constrained to press this matter on your Honors for a speedy decision, but the importance of the public interests require that there should be no further delay.

We, therefore, move the Court to dismiss the

Writ of Error, for want of jurisdiction, and in the alternative that the judgment of the Supreme Court of Louisiana be affirmed.

Respectfully submitted,

WALTER GUION,

Attorney General.

BENJAMIN RICE FORMAN,

Of Counsel for the State of Louisiana.

SAMUEL L. GILMORE,

City Attorney

for the City of New Orleans, intervenor,